RE TAN PECK KEE; EX P LDE PROJECT SDN BHD & ORS

HIGH COURT MALAYA, PULAU PINANG
KENNETH ST JAMES JC
[BANKRUPTCY NO: PA-29NCC-856-11-2020]
15 APRIL 2024

Abstract – *(i) Leave of court is required for a judgment creditor to commence a bankruptcy action against a 'social guarantor' as well as a 'guarantor other than a social guarantor'; (ii) the order for substituted service requires a judgment creditor to wait for seven days after the last date of substituted service before the judgment creditor could assert that an act of bankruptcy has been committed.*

BANKRUPTCY: *Setting aside - Bankruptcy notice and creditor's petition - Appeal - Judgment creditors issued bankruptcy notice against judgment debtor - Whether leave of court required - Whether there was non-compliance of s. 5(3)(b) of Insolvency Act 1967 - Whether bankruptcy notice valid - Whether creditor's petition premature and invalid - Whether notice and creditor's petition ought to be set aside*

There were four judgment creditors ('JCs') in this bankruptcy action. The bankruptcy notice issued against the judgment debtor ('JD') was grounded on the summary judgment which the JCs obtained against the JD at the Sessions Court ('Suit 11'). The JD applied to set aside the BN and the creditor's petition ('CP') ('encl. 28') but encl. 28 was dismissed by the Senior Assistant Registrar ('SAR'). Hence, the JD appealed to the judge in chambers. In this appeal, the JCs admitted that they did not get the leave of court before they requested for the BN to be issued against the JD. The JCs, however, argued that the JD was not a guarantor because the subject contract in Suit 11, which resulted in the judgment, was not a guarantee but an indemnity and hence, the JCs need not comply with s. 5(3)(b) of the Insolvency Act 1967 ('Act').

Held (allowing appeal):

(1) Section 5(3)(b) of the Act requires the JCs to obtain the leave of court before they could commence this bankruptcy action against the JD. The JCs' argument, that the subject contract in Suit 11 was an indemnity and not a guarantee, was untenable because the subject contract was titled 'Guarantee and Indemnity'. The preamble to this contract stated that the JD and two other named persons 'hereby unconditionally jointly and severally agree with and guarantee you (the JCs) ...'. Additionally, cl. 1 of the contract defined the sum of money that the JC and the other named persons were obligated to pay on demand as the 'guarantee sum'. Thus, for all intents and purposes, the contract was a guarantee. (paras 7 & 11-13)

(2) The leave of court was required for the JCs to commence this bankruptcy action against a 'social guarantor' as well as a 'guarantor other than a social guarantor'. The Act itself provides a definition of a 'social guarantor' under s. 2. A 'social guarantor' was a person who gives a guarantee to pay a sum due under any of the three types of loans listed. This definition necessarily means that a person, who gives a guarantee that is not for the three types of loans listed concerning a 'social guarantor', is a 'guarantor other than a social guarantor'. The subject guarantee and indemnity in Suit 11 was not a guarantee that fell into any of the three types of loans listed, which made the JD a 'guarantor other than a social guarantor' under s. 5(3)(b) of the Act. As the JD was a 'guarantor other than a social guarantor', leave was required for the JCs to commence this bankruptcy action against the JD. Since the JCs did not get the leave of court before they commenced the bankruptcy action against the JC, the BN was rendered invalid. The BN was liable and ought to be set aside on this ground. (paras 15-18)

(3) The JCs miscomputed the date the JD was said to have committed the act of bankruptcy. The JCs disregarded the seven-day deeming period provided for by the order for substituted service. The order for substituted service required the JCs to wait for seven days after the last date of substituted service before the JCs could assert that an act of bankruptcy was committed. In other words, the order for substituted service allowed the JD to be given seven days before the BN was deemed served on the JD. Put yet another way, the order for substituted services required that the BN was only deemed served on the JD by substituted service after the lapse of seven days from the date of the last date of substituted service by the newspaper advertisement of the BN. The BN was not deemed served on the very day that the BN was advertised in the newspaper. This meant that that since the date of the advertisement of the BN was on 17 May 2021, the BN was deemed served on the JD by substituted service on 24 May 2021, *ie*, seven days from 17 May 2021. The JD then, according to the terms of the BN, had seven days from 24 May 2021 to pay the BN sum. The deadline to pay the BN sum was therefore on 31 May 2021, *ie*, seven days after 24 May 2021. The JD did not pay the BN sum by 31 May 2021. He then committed the act of bankruptcy on the next day, 1 June 2021. The JCs filed the CP against the JD on 28 May 2021, before the act of bankruptcy, rendering the CP premature and invalid. The CP was bad in law. (paras 27-30)

Case(s) referred to:

Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 SC ***(refd)***

Legislation referred to:
Insolvency Act 1967, ss. 2, 3(1)(i), 5(1)(c), (i), (3)(b)

For the judgment creditors - Sunny Khoo; M/s Sunny Khoo & Co
For the judgment debtor - Arthur Wang & Nattawynn Su Wit; M/s Arthur Wang, Lian & Assocs

Reported by Najib Tamby

JUDGMENT

Kenneth ST James JC:

Prelusion

[1] By an order dated 9 November 2021, the Senior Assistant Registrar (SAR) dismissed encl. 28 – the judgment debtor's application to set aside the bankruptcy notice (BN) and the creditor's petition (CP).

[2] The judgment debtor (JD) appeals to the judge in chambers. The notice of appeal to judge in chambers is the appeal for determination before me.

[3] In hearing and determining this appeal, I am effectively deciding the merits of encl. 28 – the JD's application to set aside the BN and the CP.

[4] The JD raises several grounds in this appeal. However, it suffices to discuss and determine only the issues that are necessary to determine this appeal. These are the JD's strongest grounds – the grounds that mattered.

[5] I allow the JD's appeal *ie*, I reverse the SAR's decision. In other words, I grant the JD's application to set aside the BN and the CP. My reasons are as follows.

The JCs Needed Leave To Commence This Bankruptcy Action Against A Guarantor

[6] There are four judgment creditors (JCs) in this bankruptcy action.

[7] Section 5(3)(b) of the Insolvency Act 1967 (Insolvency Act) requires the JCs to obtain the leave of court before they can commence this bankruptcy action against the JD.

[8] Section 5(3)(b) provides as follows (emphasis added):

> Section 5. Conditions on which creditor may petition.
>
> (3) A petitioning creditor shall not be entitled to commence any bankruptcy action:
>
> (a) against a social guarantor; and
>
> (b) against a guarantor other than a social guarantor **unless the petitioning creditor has obtained leave from the court**.

[9] In this bankruptcy action, the BN issued against the JD was grounded on the summary judgment dated 17 October 2019 which the JCs (as plaintiffs) obtained against the JD (as defendant) in Sessions Court Suit No. PA-B52-11-06-2019 (SC Suit 11).

[10] In this appeal, the JCs admit that they did not get the leave of court before they requested for the BN to be issued against the JD. They, however, argue that the JD is not a guarantor. They assert that the JD is not a guarantor because the subject contract in SC Suit 11 which resulted in the judgment, was not a guarantee.

[11] First, the JCs argue that the subject contract in SC Suit 11 was an indemnity, not a guarantee. Hence, the JCs need not comply with s. 5(3)(b) of the Insolvency Act.

[12] I find this argument untenable because the subject contract is titled "guarantee and indemnity". The preamble of this contract states that the JD and two other named persons "hereby unconditionally jointly and severally agree with and guarantee you (the JCs) ...".

[13] Additionally, cl. 1 of the contract defines the sum of money that the JC and the two other named persons are obligated to pay on demand as the "guarantee sum". Thus, for all intents and purposes, the contract was a guarantee.

[14] The JCs want to go into an in-depth analysis of whether the contract is in fact and in law a guarantee, or in effect just an indemnity – to determine whether the JD is a guarantor under the Insolvency Act. I am of the view that there is no necessity to analyse the issue in this manner.

[15] The leave of court is required for the JCs to commence this bankruptcy action against a "social guarantor" as well as a "guarantor other than a social guarantor". The Insolvency Act itself guides us with a definition of a "social guarantor" under s. 2. Section 2 defines a "social guarantor" in this manner:

> "social guarantor" means a person who provides, not for the purpose of making profit, the following guarantees:
>
> (a) a guarantee for a loan, scholarship or grant for educational or research purposes;
>
> (b) a guarantee for a hire-purchase transaction of a vehicle for personal or non-business use; and
>
> (c) a guarantee for a housing loan transaction solely for personal dwelling.

[16] A "social guarantor" is a person who gives a guarantee to pay a sum due under any of the three types of loans listed. This definition necessarily means that a person who gives a guarantee that is not for the three types of loans listed concerning a "social guarantor", is a "guarantor other than a social guarantor".

[17] The subject guarantee and indemnity in SC Suit 11 is not a guarantee that falls into any of the three types of loans listed, which makes the JD a "guarantor other than a social guarantor" under s. 5(3)(b) of the Insolvency Act. As the JD is a "guarantor other than a social guarantor" – leave is required for the JCs to commence this bankruptcy action against the JD.

[18] Since the JCs did not get the leave of court before they commenced this bankruptcy action against the JD, the BN is rendered invalid. It follows that the CP is also rendered invalid. Both the BN and the CP are liable to be and should be set aside on this ground.

The CP Was Premature – It Was Issued Before The Act Of Bankruptcy

[19] One of the conditions for the JCs to file a CP against the JD is that the JD has committed an act of bankruptcy. And, the CP must be filed within six months after the JD committed the act of bankruptcy.

[20] Section 5(1)(c) of the Insolvency Act is set out below for reference (with my emphasis in bold):

> Section 5. Conditions on which creditor may petition.
>
> (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:
>
> (c) **the act of bankruptcy** on which the petition is grounded **has occurred** within six months **before** the presentation of the petition;
> …

[21] There are several acts (or omissions) which are deemed to be acts of bankruptcy. The pertinent act relied on by the JCs in this bankruptcy action was the JD's default in paying the BN sum stated in the BN within seven days from the date the BN was served on the JD.

[22] Section 3(1)(i) of the Insolvency Act is the relevant provision. Section 3(1)(i) provides (emphasis added):

> Section 3. Acts of bankruptcy.
>
> (1) A debtor commits an act of bankruptcy in each of the following cases:
>
> (i) **if a creditor has obtained a final judgment** or final order against him for any amount and execution thereon not having been stayed **has served on him in Malaysia**, or by leave of the court elsewhere, **a bankruptcy notice** under this Act **requiring him to pay the judgment debt** or sum ordered to be paid **in accordance with the terms of the judgment** or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; **and he does not within seven days after service of the notice** in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either **comply with the requirements of the**

> **notice** or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained: ...
>
> (emphasis added)

[23] In summary, the JCs can only present the CP against the JD after the JD has committed an act of bankruptcy. The act of bankruptcy relied on in this bankruptcy action was the JD's act of not paying *ie*, omission to pay the judgment sum demanded in the BN, within seven days from the date the BN was served on the JD – see *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277; [1988] 1 MLJ 304; [1987] 1 MLRA 326.

[24] In *Sovereign General Insurance* (*supra*), the Supreme Court propounded (at p. 279 (CLJ); p. 305 (MLJ)):

> ... Under section 3(1)(i) of the Bankruptcy Act 1967, a debtor commits an act of bankruptcy if a creditor has obtained a final judgment for any amount and has served on him a bankruptcy notice requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment. He has seven days after service of the notice to comply with the requirements of the notice or satisfy the court that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained. ...

[25] In this bankruptcy action, the JCs obtained an order to serve the BN on the JD by substituted service. The terms of the order for substituted service state that the BN is deemed properly, sufficiently and regularly served on the JD seven days after the last act of posting or advertising the BN.

[26] The JCs do not dispute that their last date of effecting substituted service, which was by advertising the BN in a daily newspaper, was 17 May 2021. The JCs assert that the BN was deemed served on that very day *ie*, on 17 May 2021. And as the JD did not pay the BN sum within seven days from 17 May 2021, the JD committed an act of bankruptcy on 24 May 2021 (17 May 2021 plus seven days). The JCs filed the CP against the JD on 28 May 2021, which was after the JD's act of bankruptcy.

[27] I find that the JCs have miscomputed the date that the JD was said to have committed the act of bankruptcy. The JCs have disregarded the seven – day deeming period provided for by the order for substituted service. The order for substituted service required the JCs to "wait" for seven days after the last date of substituted service before the JCs could assert that an act of bankruptcy was committed. In other words, the order for substituted service

allowed the JD to be given seven days before the BN was deemed served on the JD. Put yet another way, the order for substituted service required that the BN was only deemed served on the JD by substituted service after the lapse of seven days from the date of the last date of substituted service by the newspaper advertisement of the BN. The BN was not deemed served on the very day that the BN was advertised in the newspaper.

[28] This meant that since the date of the advertisement of the BN was on 17 May 2021, the BN was deemed served on the JD by substituted service on 24 May 2021 (seven days from 17 May 2021). The JD then, according to the terms of the BN, had seven days from 24 May 2021 to pay the BN sum. The deadline to pay the BN sum was therefore on 31 May 2021 (seven days after 24 May 2021). The JD did not pay the BN sum by 31 May 2021. He then committed the act of bankruptcy on the next day: 1 June 2021.

[29] The JCs filed the CP against the JD on 28 May 2021, before the act of bankruptcy, rendering the CP indeed premature and invalid. The CP should be set aside on this ground as well.

[30] I therefore find that the CP is also bad in law and is rendered invalid.

Conclusion

[31] The BN is bad in law because the JCs did not obtain the leave of court to institute this bankruptcy action against the JD.

[32] The CP is bad in law because it was presented against the JD before the JD committed the asserted act of bankruptcy on which the CP is premised.

[33] These two cogent grounds are sufficient to compel me to allow the JD's appeal.

[34] In the circumstances, I allow the JD's appeal against the SAR's decision on encl. 28 – the JD's application to set aside the BN and the CP. I therefore order that the BN be set aside and the CP be set aside as well, with costs of RM10K for the proceeding before the SAR and for this appeal, to be paid by the JCs to the JD by 24 February 2024. Costs are subject to the allocatur.